No. 85-1449

In the

Supreme Court of the United States

OCTOBER TERM, 1985

TOWN OF NEWTON, ET AL.,
PETITIONERS,

BERNARD H. RUFFRY, JR.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief for Amici Curiae American Civil Liberties Union and Civil Liberties Union of Massachusetts in Support of the Respondent

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Respondent.

On Writ of Certiorari to the United States Court of Appeals For the First Circuit

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BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND CIVIL LIBERTIES UNION OF MASSACHUSETTS IN SUPPORT OF THE RESPONDENT

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. All parties have consented to the filing of this brief, and letters expressing such consent have been lodged with the Clerk.

ISSUE PRESENTED FOR REVIEW

This brief addresses the important question whether a covenant not to sue public officials for violations of constitutional rights, in exchange for a prosecutor's agreement to nolle prosequi threatened criminal charges, is void per se as against public policy.

INTEREST OF THE AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization which has over 250,000 members. The Civil Liberties Union of Massachusetts ("CLUM") is a state affiliate of the ACLU. Since their founding in 1920, both ACLU and CLUM have been exclusively concerned with the protection of the fundamental rights and individual liberties which are guaranteed by the constitution of the United States.

ACLU has filed briefs in this Court, as counsel for a party or as amicus curiae, in many cases involving the construction and application of 42 U.S.C. §1983 and related civil rights statutes. Both ACLU and CLUM have been particularly concerned by misconduct on the part of police officers which has resulted in violations of constitutional guarantees. CLUM has challenged on several occasions the type of release-dismissal agreement which is at issue in his case, most recently in Hall v. Ochs, 623 F.Supp. 367 (D. Mass. 1985), appeal pending, in which the court held invalid a release extracted from a prisoner who had been arrested without probable cause and assaulted by officers of the Milton, Massachusetts, Police Department.

SUMMARY OF ARGUMENT

An agreement for dismissal of criminal charges in exchange for a covenant by a potential criminal defendant not to sue

public officials under 42 U.S.C. §1983 unacceptably impairs a person's First Amendment right of access to the courts to vindicate claims of constitutional violation and undermines the remedy for such violations which has been provided by Congress in 42 U.S.C. §1983.

The decision below of the Court of Appeals for the First Circuit that release-dismisal agreements are void per se is squarely in line with principles established by decisions of this Court that a person's First Amendment right of access to the courts for vindication of federally guaranteed rights may not be impaired by a decision to prosecute criminally a person because of his or her exercise of federal rights. Holding release-dismissal agreements void per se provides full opportunity for public airing of charges of police and other official misconduct and prevents compromise of the criminal justice

system by dismissals of criminal complaints based on agreements shielding public officials from civil liability arising out of such complaints -- a matter wholly extraneous to the public interest at issue in a criminal proceeding.

Petitioners' position that release-dismissal agreements should be upheld if they are "voluntary deliberate, and informed" does not adequately protect the First Amendment Right of access to the courts to vindicate claimed violations of federally protected rights. No pre-trial release-dismissal agreement can be voluntary because the circumstances in which it is entered into by a person threatened with criminal charges are inherently coercive. Because of the risk of incarceration, fines, and civil disabilities, even an innocent defendant is virtually compelled to accept the terms of a pre-trial release-dismissal agreement.

The "voluntary, deliberate, and informed" standard would not invalidate release-dismissal agreements tainted by prosecutorial misconduct because that standard, as applied by the courts, focuses on the defendant's state of mind and his or her opportunity to make a considered decision in light of knowledge of the basic facts of the situation and not on the conduct and motivation of the prosecutor.

Judicial acceptance of a "voluntary, deliberate, and informed" standard for upholding plea bargains does not justify use of such a standard for judging the validity of release-dismissal agreements. A plea bargain properly focuses only on concerns involved in the criminal proceeding, and the "voluntary, deliberate and informed" standard is applied to plea bargains so the court may be assured that the defendant's guilty plea is truthful. A release-dismissal agreement, on the other

hand, focuses primarily on the private concerns of those officials seeking protection from civil action by the potential criminal defendant, which are extraneous to the criminal proceeding. Furthermore, the "voluntary, deliberate, and informed" standard has nothing to do with the public policy justifications claims for use of that standard to judge the validity of such agreements. That standard does not sort out meritorious civil claims from those without merit, does not protect only those law enforcement officials who act in good faith, and does not validate only release-dismissal agreements which result in a "just" resolution of the criminal proceeding.

In view of the pernicious interference by release-dismissal agreements with the First Amendment right of access to the courts to vindicate federal rights, any such agreements can be justified, if at

all, only if they serve compelling public policy needs that outweigh the constitutional rights with which they interfere. However, such agreements serve only the private interests of the public officials and other persons whose conduct is protected from civil suit and public scrutiny by such agreements, and petitioners have shown no public interest that would be served by upholding such agreements as are "voluntary, deliberate and informed.

Such agreements which are entered into voluntarily, deliberately and knowingly do not serve to protect only law enforcement personnel who act in good faith to diligently enforce the law. The "voluntary, deliberate, and informed" standard would not distinguish between law enforcement personnel who act in good faith from those who do not and would protect, improperly, the latter as well as the

former. Such agreements would not encourage broad-based citizen involvement and assistance in the administration of justice because when victims and witnesses report possible crimes they have no idea whether a release-dismissal agreement will ever be obtained or, if obtained, would be upheld under a "voluntary, deliberate, and informed" standard, which takes no account of the nature of the conduct of the victims or witnesses. The legal system provides protections for law enforcement personnel and private citizens by other means more direct, relevant, and effective than occasional, after-the-fact release-dismissal agreements.

Release-dismissal agreements which are "voluntary, deliberate, and informed" do not provide prosecutors and defendants with a vehicle for achieving a "just resolution" of certain cases. Whether such an agreement relating to an extraneous civil

matter is "voluntary, deliberate, and informed" has nothing to do with whether resolution of the criminal case is "just." A prosecutor's obligation under law is to exercise his or her discretion whether to prosecute solely in accord with the public interest served by the criminal justice system and not on the basis of a defendant's agreement to protect the private interest of certain individuals by agreeing not to institute a civil action against them.

Finally, release-dismissal agreements are not a proper tool for the assertion by potential defendants of their constitutional rights. Such agreements provide an inadequate and incomplete remedy for violations of individual rights. They deprive the victim of all other compensation and defeat the deterrent goals of the civil remedy provided by 42 U.S.C.§1983.

ARGUMENT

I. RELEASE-DISMISSAL AGREEMENTS UNACCEPTABLY IMPAIR ACCESS TO THE COURTS FOR VINDICATION OF CONSTITUTIONAL RIGHTS.

An agreement for dismissal by a prosecutor of criminal charges in exchange for a covenant by a potential criminal defendant not to bring a civil action against public officials under 42 U.S.C. §1983 unacceptably impairs a person's First Amendment right of access to the courts to vindicate claims of constitutional violation and undermines the remedy for such violations which has been provided by Congress in 42 U.S.C. §1983.

It is firmly established by the decisions of this Court that a decision to prosecute may not be based on the exercise by the potential defendant of protected constitutional or statutory rights. See e.g., Cox v. Louisiana, 379 U.S. 536, 557-558 (1965); Wayte v. United States, 105 S.Ct. 1524, 1531 (1985); United States v.

Goodwin, 457 U.S. 368, 372 (1982); Blackledge v. Perry, 417 U.S. 21, 27-29 (1974); North Carolina v. Pearce, 395 U.S. 711, 723-726 (1969); United States v. Falk, 479 F.2d 616, 618-619, 623 (7th Cir. 1973). The prosecution of a criminal case, or the threat of such prosecution, for the purpose of preventing or deterring the defendant from asserting a civil claim against the arresting officers or the prosecutor is plainly a prohibited interference with constitutionally guaranteed rights.

A cornerstone of our system of constitutional government is the right of access to the courts to seek redress for violations of rights guaranteed by federal law. See In Re Primus, 436 U.S. 412, 422-432 (1978); United Mine Workers of America v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); NAACP v. Button, 371 U.S. 415 (1963) (all holding that First Amendment rights are impaired by restrictions on

access to the courts); see also Wolff v. McDonnell, 418 U.S. 539, 579 (1974) ("The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental rights."); Bounds v. Smith, 430 U.S. 817 (1977).

Just as a prosecution which is brought in retaliation for the exercise of federally guaranteed rights is an impermissible burden on those rights, a prosecution which is pursued following the defendant's refusal to execute a release absolving the police and other public officials of all civil liability is a blatant interference with assertion of rights guaranteed by the First Amendment and by section 1983. Thus, for example, in MacDonald v. Musick, 425 F.2d 373 (9th Cir.), cert. denied, 400 U.S. 852 (1970),

the court of appeals granted habeas corpus relief to a defendant who was convicted of resisting arrest after the prosecutor withdrew a motion to dismiss criminal charges when the defendant refused to stipulate that there was probable cause for his arrest. In ordering that the defendant be released from custody, the court held that he had a right to seek redress for his claim that he had been badly beaten by the police, and that the purpose of the criminal prosecution was to preclude his exercise of that right.

> [T]he attempt, by imposing the stipulation as a condition to the dismissal of the drunk driving charge, was to hamper MacDonald in asserting, by civil action, both state and federal civil rights. And the revival of the resisting arrest charge was the bludgeon behind this attempt.

Id. at 377.

Moreover, such efforts to bar the assertion of federal claims are completely at odds with the goals of Congress in enacting 42 U.S.C. §1983, which "was

intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations as well." Owen v. City of Independence, 445 U.S. 622, 651 (1980).

For these reasons, most courts which have considered the validity of releases of civil-rights claims obtained in exchange for dismissal of criminal charges have found them to be invalid. E.g., Boyd v. Adams, 513 F.2d 83 (7th Cir. 1975); Horne v. Pane, 514 F, Supp. 551, 552 (S.D.N.Y. 1981); cf. Brewer v. Blackwell, 692 F.2d 387 (5th Cir. 1982); contra, Hoines v. Barney's Club, Inc., 28 Cal. 3d 603, 620 P.2d 628 (1980) (4-3 decision).

The decision in this case of the Court of Appeals for the First Circuit holding that release-dismissal agreements are void per se is squarely in line with these principles. It recognizes that only a

blanket rejection of such agreements can adequately protect an individual's access to the courts to vindicate violations of constitutional rights. Holding such agreements void per se also provides full opportunity for public airing of charges of police and other official misconduct and prevents compromise of the integrity of the criminal justice system from dismissals of criminal complaints based on agreements shielding public officials from civil liability arising out of such complaints -- a matter wholly extraneous to the public interest at issue in the criminal proceeding.

II. PETITIONERS' APPROACH TO RELEASE-DISMISSAL AGREEMENTS DOES NOT ADEQUATELY PROTECT THE IMPORTANT CONSTITUTIONAL RIGHTS AT ISSUE.

A. The Circumstances Surrounding the Pre-Trial Execution of a Release-Dismissal Agreement are Inherently Coercive.

The purpose of release-dismissal agreements, as the opinion of the court of appeals implicitly recognized, is not to protect the public official who is blameless from the burden of defending against "baseless" or "unwarranted" litigation. "[W]here the prosecution acts reasonably and has a fairly good case against the claimant . . . a good defense to a civil rights claim will exist and the need for a release will not come into play." Rumery v. Town of Newton, 778 F.2d 66, 70 (1985).

The release takes on importance, however, when a colorable civil rights claim may be asserted. A survey of the reported decisions shows that this is frequently the case. See, e.g., Hall v. Ochs, 623 F.Supp. 367 (D. Mass. 1985), appeal pending (black man assaulted by white police officers and arrested without probable cause); MacDonald v. Musick, 425

F.2d 373 (9th Cir.), cert. denied, 400 U.S. 852 (1970) (defendant alleged that "he was badly beaten by the police"); Boyd v. Adams, 513 F.2d 83, 85 (7th Cir. 1975) (civil rights complaint alleged that police beat and abused a pregnant woman); Dixon v. District of Columbia, 394 F.2d 966, note 2 (D.C. Cir. 1968) (retired black police officer charged two white police officers with brutality); Horne v. Pane, 514 F.Supp. 551, 552 (S.D.N.Y. 1981) (complaint alleged that defendant verbally abused plaintiff on account of his race, beat him, arrested him and left him handcuffed to a chair for hours). Indeed, in cases involving serious police misconduct, the underlying charge is often a "cover charge" which has been brought to protect the offending officers. Avery and Rudovsky, Police Misconduct: Law and Litigation, §8.2(a) (2d. ed. 1986).

The effectiveness of the release-dismissal agreement in shielding police misconduct derives from the fact that the defendant is virtually compelled to accept the terms of the agreement. As Justice Tobriner observed in his thoughtful dissent in Hoines v. Barney's Club, Inc., 28 Cal. 3d 603, 620 P.2d 628, 637 (1980) (Tobriner, J., dissenting), "[t]he threat to maintain a criminal prosecution is, however, necessarily coercive. An innocent defendant may well prefer to surrender his right to redress for false arrest rather than undergo the risk, expense and inconvenience of a criminal trial." The defendant in a criminal case faces the possibility of incarceration, fines and civil disabilities. Even the defendant who is wholly innocent of criminal activity will be reluctant to refuse the offer of dismissal under these circumstances. This is not, as the court below and numerous

other courts have concluded, an uncoerced choice. Rumery v. Town of Newton, supra at 69-70; Boyd v. Adams, supra at 87-88; Hall v. Ochs, supra; Horne v. Pane, supra at 552.[1]

B. Petitioners' "Voluntary, Deliberate and Informed" Standard Would Not Adequately Protect Defendants Against Prosecutorial Misconduct.

Even if the circumstances surrounding all release-dismissal agreements were not regarded as inherently coercive such agreements are void per se as against public policy because they are subject to possible prosecutorial misuse against which the ad hoc standard of "voluntary deliberate, and informed" would not guard.

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[1] Neither Bushnell v. Rosetti, 750 F.2d 298 (4th Cir. 1984), nor Jones v. Taber, 648 F.2d 1201 (9th Cir. 1981), is inconsistent with the majority view that the proposal of a release-dismissal prior to trial in a criminal case is "inherently coercive." The agreement at issue in Bushnell was signed after the court had found the defendant guilty on all charges. In Jones, there was no criminal prosecution and no "release-dismissal" agreement. The sole issue was the voluntariness of the release executed by the plaintiff.

Petitioners do not deny that release-dismissal agreements can be misused and can serve as vehicles for prosecutorial misconduct. (Pet. Br. 25.) This concern has led several courts to criticize attempts to obtain releases of civil claims in exchange for dismissal of criminal charges for their pernicious impact on our system of criminal justice. In Dixon v. District of Columbia, 394 F.2d 966, 969 (D.C. Cir. 1968), the court of appeals said:

> ... the major evil of these agreements is not that charges are sometimes dropped against people who probably should be prosecuted. Much more important, these agreements suppress complaints against police misconduct which should be thoroughly aired in a free society. And they tempt the prosecutor to trump up charges for use in bargaining for suppression of the complaint. The danger of concocted charges is particularly great because complaints usually arise in connection with arrests for extremely vague offenses such as disorderly conduct or resisting arrest.

These words were quoted with approval in Boyd v. Adams, 513 F.2d 83, 89 (7th Cir. 1975).

Petitioners acknowledge the impropriety of the releases given in the three decisions on which the court of appeals relied, Dixon v. District of Columbia, 394 F.2d 966 (D.C. Cir. 1968); MacDonald v. Musick, 425 F.2d 373 (9th Cir. 1970); and Boyd v. Adams, 513 F.2d 83 (7th Cir. 1975). (Pet. Br. 24) But, they argue, "in each of those cases, the releases would have been invalid under the voluntary, deliberate and knowing standard applied by the trial court in the case at bar." (Pet. Br. 25) In fact, there is no reason to believe that those releases would have been found to be involuntary, and the standard suggested by the petitioners would have left the victims of abuse in those cases without an effective remedy.

Dixon v. District of Columbia, supra, involved a retaliatory prosecution for traffic violations, brought after the defendant allegedly reneged on an agreement not to file complaints of misconduct against the police officers who stopped him. Id. at 967. Notwithstanding what the court described as "blatant Government misconduct," Id. at 970, the release-dismissal agreement would almost surely have been upheld under the petitioners' standard. The agreement was entered into two days after the defendant was stopped by police officers for alleged traffic violations, before the defendant was either charged or ticketed, let alone incarcerated. Id. at 968. There are no facts which suggest that the defendant's decision to enter into the agreement was influenced by anything offer than making the "difficult decision" of choosing the certainty of dismissed criminal charges

over the uncertainty of prevailing both on a plea of innocence in a criminal trial and a section 1983 claim against the police officers. Petitioners themselves characterize this type of choice as uncoercive, that is, voluntary, deliberate, and informed. (Pet. Br. 31-32).

Similarly, MacDonald v. Musick, supra, involved the invalidation of a retaliatory amendment to a criminal complaint upon the defendant's refusal to stipulate to probable cause and thereby shield arresting officers from civil liability for false arrest. MacDonald did not determine that the circumstances surrounding the proposal to stipulate to probable cause were coercive in any sense other than that the threat of criminal prosecution itself amounted to coercion. Id. at 375 ("the situation is made no better by the fact that here the record indicates that it was the court that asked MacDonald whether he

would stipulate. Rather it makes it worse. It brings the court to the aid of the prosecutor in coercing the defendant into agreeing to what amounts to a forfeiture of his civil rights") (emphasis added).

In the single civil case cited by petitioners as an example of a litigation of a release which would have been invalid under the voluntary, deliberate and knowing standard, (Pet. Br. 24), the holding rested on recognition of the threat of the consequences of criminal charges as inherently coercive. Boyd v. Adams, 513 F.2d 83, 88 (7th Cir. 1975). The court of appeals based its conclusion of duress on the plaintiff's testimony that she "thought she would again be put in jail" if the criminal charges were not dropped because she would not be able to pay the fines required upon conviction. Id. at 87-88.

Indeed, the district court in Boyd, applying the standard urged by the petitioners, found that the release had been "that plaintiff had knowingly waived her right to pursue civil claims against defendants and . . . no coercion or duress of any sort had been exerted upon her." Id. at 87. The circuit court's reversal, approved by the petitioners, rested on characterizing plaintiff's fear of the consequences of a criminal prosecution as coercion.[2]

In sum, the courts in the Dixon, MacDonald, and Boyd cases invalidated the releases not because of prosecutorial misconduct but because of their view that the environment of arrest and threat of

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[2] The reversal also depended on an explicit rejection of the proposition that the coercive character of the situation could be negated because release-dismissal negotiations were initiated by plaintiff's counsel. Id. at 88

criminal charges in which such releases are obtained is inherently coercive -- a view which petitioners challenge.

At the end of their argument on prosecutorial misconduct petitioners tacitly admit that the "voluntary, deliberate and informed" standard advocated by them is not adequate to identify prosecutorial misconduct when they say, "Public policy concerns are met if the charge is supported by evidence and the primary purpose of the prosecutor is not to cover up police misconduct." (Pet. Br. 25) To determine that, of course, would require greatly expanding the scope of the inquiry beyond the confines of the "voluntary, deliberate and informed" standard to include an examination of the entire evidentiary basis of the proposed criminal charge, a full examination of all the facts surrounding the potential defendant's claim of police misconduct, and a full

examination of the facts and reasons alleged to underlie the prosecutor's decision to enter into the release-dismissal agreement. Petitioners advance no serious proposal that an ad hoc approach should really be so expansive. Indeed, such an expansive inquiry would undercut their argument that their approach would quickly and inexpensively dispose of many civil rights actions (all of them, in petitioners' eyes, groundless) and would not burden the courts with administrative costs and problems.

C. The Approach Approved for Plea Bargains Is Not Appropriate for Release-Dismissal Agreements.

Petitioners' final effort to brush aside the policy concerns of the circuit court is to seek to analogize release-dismissal agreements to plea-bargaining agreements. Petitioners argue that the policy considerations bearing on release-dismissal transactions are analogous to

those bearing on plea-bargaining transactions so that decisions of this Court subjecting the latter to a "voluntary, deliberate and informed" standard support the same approach to release-dismissal agreements.

The argument, while superficially appealing, does not withstand analysis. A plea bargain is very different from a release-dismissal agreement and is designed to serve different public policy considerations. A plea bargain necessarily presupposes that the prosecutor has just cause, and an adequate basis, for prosecuting some crime, and the negotiation is properly confined to considerations involved in the criminal proceeding itself and not matters extraneous thereto. See Bordenkircher v. Hayes, 434 U.S. 357, 363 at note 8 (1978). The protective requirement that a defendant's guilty plea in a plea bargain be "voluntary,

deliberate, and informed" is geared primarily to ensuring that the defendant's plea of guilty is truthful. See Brady v. United States, 397 U.S. 742, 757-758 (1970).

In the case of a release-dismissal agreement, on the other hand, there is no necessary presupposition that a prosecutor has just cause to prosecute anything, as indicated by the prosecutor's willingness to drop all charges and his concern that the conduct of law enforcement officials in bringing the charges has been such as to require protection from civil action through a release. In such a case, a prosecutor's statement that he will prosecute criminal charges unless the defendant signs a release of possible civil action is indistinguishable from an impermissible retaliatory prosecution. Furthermore, unlike the plea-bargain, in the release-dismissal situation the

negotiation necessarily focuses primarily not on matters involved in the criminal proceeding itself, but on the wholly extraneous matter of a possible civil action that may not even have been instituted.

Most critical to the distinction between the plea bargain and the release-dismissal agreement is that while the "voluntary, deliberate and informed" standard is relevant to the objective of ensuring that the defendant's guilty plea is truthful, that standard, as applied to the release-dismissal agreement, has nothing to do with what the petitioners cite as the policy justifications for using that standard to judge the validity of such an agreement. They emphasize repeatedly that such agreements protect law enforcement personnel and governmental entities from unjustified civil actions and enable defendants to obtain quickly a

desired termination of justified criminal prosecution. Yet the standard of "voluntary, deliberate and informed" urged by petitioners does not distinguish between "justified" and "unjustified" civil actions and "justified" and "unjustified" criminal prosecutions. The conduct of law enforcement personnel can be the most outrageous imaginable, and the criminal charges can be wholly fabricated, and if the release-dismissal is "voluntary, deliberate, and informed" the release would stand. That standard, which takes no account of the possible misconduct which might form the basis of the civil rights claim and no account of the supportability of the criminal charges, inherently would permit precisely the kind of police and prosecutorial misconduct with which the circuit court was concerned.

In sum, plea-bargaining, as approved by this Court, focuses wholly on the public interest involved in the criminal proceeding itself -- a matter within the scope of the prosecutor's proper concerns -- whereas release-dismissal agreements focus on matters extraneous to the criminal proceeding and involve the prosecutor in resolution of civil actions in which he has no stake and no proper role. The differences between plea bargains and release-dismissals are accompanied by different public policy considerations which make an approach based on a "voluntary, deliberate, and informed" standard appropriate for plea bargains but wholly inappropriate for release-dismissal agreements.

Plea bargaining serves important public interests in the fair, individualized, efficient and effective functioning of the criminal justice system.

Release-dismissal agreements serve no such public interest but compromise the criminal justice system solely to protect private interests against civil suits. Use of the "voluntary, deliberate and informed" standard to judge the validity of release-dismissed agreements does not serve a significant public interest and does not protect civil rights claimants against what all parties recognize as the potential for abuse of release-dismissal agreements.

III. THERE ARE NO COMPELLING PUBLIC POLICY REASONS FOR UPHOLDING EVEN THOSE RELEASE-DISMISSAL AGREEMENTS THAT ARE ALLEGED TO HAVE BEEN ENTERED INTO "VOLUNTARILY, DELIBERATELY AND KNOWINGLY."

Petitioners "do not deny that release-dismissal agreements can be misused" (Pet. Br. 25) and the amici curiae Americans for Effective Law Enforcement, Inc.; The International Association of Chiefs of Police, Inc. and The National District Attorneys Association, Inc., in a

brief in support of the petitioners, "concede that many abuses have occurred, and that a significant number of releases have been the product of some level of coercion..." (AELE Amici Brief 3).

In view of the admitted potential for misues of release-dismissal agreements, and their pernicious foreclosure of the right of access to the courts to vindicate federally guaranteed rights, the only conceivable basis for upholding release-dismissal agreements would be if they served compelling public-policy needs that outweigh the consitutional rights with which they inherently interfere.

Petitioners concede that release-dismissal agreements cannot be justified on the basis of benefit to individual interests such as those of individual complainants, police officers or prosecutors because agreements resolving criminal proceedings must vindicate and

serve the public interest rather than individual interests. (See Pet. Br. 12-13). Rather, petitioners seek to justify release-dismissal agreements by fabricating claimed benefits to the public interest. There is no substance to any of these claims.

A. Any Protection Afforded by Release-Dismissal Agreements Benefits only Private Persons and Serves No Substantial Public Interest.

Foremost among the benefits to the public interest claimed by the petitioners is the protection of local law enforcement officials and private complainants from civil lawsuits arising from their involvement or assistance in the administration of the criminal justice system. (Pet. Br. 13). Release-dismissal agreements, petitioners suggest, serve "the public interest in effective law enforcement, in attracting and motivating dedicated police personnel and in

encouraging victims of crime to report offenses freely and to assist law enforcement officials..." (Pet. Br. 13).

However, petitioners fail to demonstrate how release-dismissal agreements make any such significant contribution to this public interest. It cannot be contended -- and petitioners do not so state -- that upholding some release-dismissal agreements on the basis of criteria that have nothing to do with the conduct of law enforcement officials or private complainants in reporting, and developing evidence for prosecution of, criminal offenses plays any significant role in "attracting and motivating dedicated police personnel and in encouraging victims of crime to report offenses freely and to assist law enforcement officials." When the police and victims of crime develop evidence for prosecution of a possible criminal offense

they have no idea whether the possible offense will be prosecuted; if so, what the outcome will be; if not, whether a release-dismissal agreement will be obtained; if obtained, whether it will be upheld; or if, regardless of anything else, the defendant will seek to file a civil rights action anyway. As the standard proposed by petitioners for upholding a release-dismissal agreement -- that it be "voluntary, deliberate, and informed" (Pet. Br. 35) -- has no relationship to the conduct of the police or the victim in reporting and investigating the alleged crime, such persons cannot shape that conduct in any way by the prospect that a release-dismissal agreement might be obtained and upheld.

With so many imponderables, it is obvious that an after-the-fact release-dismissal agreement that would be upheld as proper under petitioners' standard would

not provide the type of protection on which the beneficiaries could necessarily rely in shaping their conduct. Furthermore, in many cases it may be protection to which they are not fairly entitled. Petitioners' "voluntary, deliberate, and informed" standard for upholding release-dismissal agreements does not address the question whether in any particular case it serves the public interest to protect the particular law enforcement officials from possible civil action for the particular conduct involved.[3]

The legal system has recognized the need for legitimate forms of protection of law enforcement officials and private citizens who become involved in law enforcement efforts and, as petitioners recognize, has provided such protection by means far more direct, relevant, and

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[3]Indeed, there may well be cases where the prosecutor's obligation is not to protect such officials but to prosecute them criminally for their conduct.

effective than occasional after-the-fact release-dismissal agreements. Such protection includes indemnity statutes for law enforcement officials, witness-tampering statutes, various privileges and immunities for individuals who report suspected criminal activity to law enforcement officials, and, most significantly, the "good faith" immunity defense available under 42 U.S.C. §1983. (See Pet. Br. at 13-14).

Petitioners endeavor to discount the value of these protections by asserting "the harsh reality that individuals, governments, and society frequently pay a high price in litigation, regardless of the merit of claims or the eventual outcomes of the cases." (Pet. Br. 14). That, of course, is true of any litigation, whether involving governmental or private litigants. But the legal system has rightly determined that the proper way to

minimize such costs is to do what can be done directly through establishment of appropriate defenses limiting liability and through procedural devices such as summary judgment for early termination of non-meritorious claims. Summary judgment has been used successfully to terminate civil rights cases in defendants' favor without trial, including cases where the determinative issue was probable cause for defendants to prosecute alleged criminal activity. Palhava de Varella-Cid v. Boston Five Cents Savings Bank, 787 F.2d 676 (1st Cir. 1986) (held, on summary judgment, that undisputed facts established probable cause even where the plaintiff had been acquitted of all criminal charges).

The fatal flaw in this policy justification for petitioners' approach to release-dismissal agreements is that the standard for upholding a release-dismissal agreement -- that it be "voluntary,

deliberate, and informed" -- makes no distinction between meritorious and non-meritorious civil rights claims. That standard focuses only on the defendant's state of mind in entering into the release-dismissal agreement and not at all on whether the defendants' civil rights claims are, or may be, meritorious. Indeed, the merit of claims based on alleged violations of important constitutional rights cannot, and should not, be judged by evaluation of the propriety of a release-dismissal agreement. The merit of such important claims should be judged by nothing less than the judicial procedure for litigating such claims provided in section 1983. It is only through such procedures -- and not through ad hoc evaluation of release-dismissal agreements -- that the meritorious civil

rights claims can fairly and legitimately be sorted out from the non-meritorious claims.

Petitioners assert that "municipalities can, and often are, in effect, held hostage by vindictive claimants regardless of the legal merits of their claims." (Pet. Br. 16). But petitioners cite no authorities, no facts, no statistics to support this claim. And they provide no basis for concluding that the approach to release-dismissal agreements which they propose will in fact eliminate whatever cases there may be, if any, in which municipalities are so held "hostage."

Petitioners and the AELE amici curiae complain that governmental entities are bearing increased liability insurance costs, or suffering from unavailability of liability insurance, because of the costs of defending even non-meritorious civil

rights claims. (Pet. Br. 15). But, as the AELE amici curiae's own brief shows, these insurance problems are not the result of increased costs of defending against non-meritorious claims. As the cause of the problem, "insurance companies blame a series of multi-million dollar judgments against other cities..." (AELE Amici Brief 6). Obviously the cause of the liability insurance problem is not the costs of defending against non-meritorious civil rights claims but the payment of large judgments in meritorious claims. It is those costs of meritorious civil rights claims with which petitioners and the AELE amici are, and should be, truly concerned. But it is precisely those costs -- incurred in compensating violations of individuals' constitutional rights -- which no ad hoc evaluation of release-dismissal agreements should be permitted to preclude.

B. Release-Dismissal Agreements Do Not Facilitate the Just Resolution of Criminal Prosecutions.

Next petitioners seek to find a public-policy justification for their approach to release-dismissal agreements by the claim that such agreements provide "both prosecutors and defendants with an effective and practical vehicle for achieving a just resolution of certain cases." (Pet Br. 16.)

Again the tool -- upholding release-dismissal agreements which are voluntary, deliberate, and informed -- has no relationship (except by coincidence) to the specified public interest, "a just resolution of certain cases." Whether the resolution of the particular case is "just" is an entirely different inquiry from whether the release-dismissal agreement was voluntary, deliberate, and informed. Such

an agreement may be all of those things without serving in the slightest to ensure that the resolution of the case is "just."

Exercise of a prosecutor's discretion is controlled by his or her duty to pursue the public interest in justice, without regard for a potential defendant's agreement not to institute a civil action. Accord, Dixon v. District of Columbia, supra at 969; MacDonald v. Musick, supra at 375; Horne v. Pane, supra at 552. The prosecutor may legitimately determine that the prosecution of a particular criminal complaint will not further this public interest for any of the following reasons: (1) if he lacks a good faith belief that the state possesses sufficient evidence to convict, (2) if the case is of low general deterrence value, or (3) if the charge is low on the order of the Government's enforcement priorities, Wayte v. United States, supra at 1531. If the prosecutor

determines on these, or on any other legitimate grounds relating to the case and its role in the criminal justice system, that the interests of justice require a dismissal of the charges, then a threat to prosecute if the potential defendant refuses to execute a release of any civil claims violates the prosecutor's duty to serve the public interest. See Dixon v. District of Columbia, supra at 969; MacDonald v. Musick, supra at 375; Hoines v. Barney's club, Inc., supra at 635-636 (Tobriner, J., dissent); Horne v. Pane, supra at 552. Conversely, it would be a gross dereliction of that duty if a complainant presented a prosecutable case involving a serious criminal offense but the prosecutor declined to prosecute because he was able to obtain a release of civil-rights claims aganst law enforcement

officials who were more concerned about such claims than about the criminal offense.

Contrary to petitioners' claim, the facts of the present case do not in the least demonstrate "the desirability of having a release-dismissal option available to defendants and prosecutors." (Pet. Br. 17). What they demonstrate is that, quite apart from the release-dismissal agreement, there was every reason not to prosecute and the prosecutor would probably have filed a nolle prosequi of the case without the agreement except that "Rumery's lawyer was threatening civil action." (Pet. Br. 19) In response to the allegation by Rumery's lawyer of a violation of Rumery's constitutional rights, the prosecutor then insisted on the release-dismissal agreement to protect the municipality, its police chief and, supposedly, a complainant. Obtaining this agreement somehow, according

to petitioners, "allowed the prosecutor sufficient discretion to arrive at a just resolution of the charges against Rumery while protecting a fragile but vital witness." (Pet. Br. 19)

If entry of nolle prosequi was a "just resolution of the charges against Rumery," however, they should simply have been dropped -- without bringing in the extraneous consideration of protecting anyone against a civil action. Obtaining protection from civil litigation is not a proper part of the prosecutor's function to vindicate public rights through the criminal justice system. This Court should not permit a prosecutor's discretion whether to prosecute to be based on whether a potential criminal defendant agrees to give a release of possible civil claims.

C. Release-Dismissal Agreements Are Not a Proper Tool for Asserting Constitutional Rights.

Petitioners' final try at finding a public-interest justification for the ad hoc approach to release-dismissal agreements is the feeblest of all -- the claim that such agreements benefit persons charged with crime by providing them with an "effective, inexpensive, and accessible mechanism" for enforcing their constitutional rights pursuant to 42 U.S.C. §1983. (Petitioners do, at least acknowledge that, "at first blush, the notion that a waiver of rights can serve as a mechanism for enforcing those rights appears oxymoronic.") (Pet. Br. 20).

Petitioners' suggestion that "Rumery utilized his constitutional rights . . . to create leverage with which he obtained a complete dismissal of the charges against him" (Pet. Br. 20-21) appears to be at odds with petitioners' earlier description of

the prosecutor's decision as "a reasonable exercise of discretion in the public interest" and "a compassionate, humane decision as to the victim." (Pet. Br. 18.) From these conflicting descriptions it is difficult to know what petitioners really claim to have happened. If Rumery did indeed use the threat of a section 1983 civil action to "leverage" a complete dismissal of criminal charges that would not otherwise have been dismissed, such "leverage" exercised in Rumery's private interest was improperly permitted to defeat the public interest in prosecution of a supportable charge of witness tampering.

The key point, however, is that obtaining dismissal of a criminal charge cannot be viewed as an appropriate remedy for victims of civil rights violations. Because release-dismissal agreements accomplish only a criminal dismissal for the victim, they address only a single

consequence of government misconduct -- the improperly brought criminal charge. They deprive the victim of all other compensation for constitutional torts and defeat the deterrent goals of civil remedies. For these reasons, the vindiction of civil rights should be left to the remedy expressly provided by Congress under 42 U.S.C. §1983.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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